Supreme Court, U.S.
FILED
NOV 10 1992
OFFICE OF THE CLERK

No. 92-638

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

INTERNATIONAL FUNDING INSTITUTE, INC., ET AL.,
PETITIONERS,

v.

FEDERAL ELECTION COMMISSION, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT FEDERAL ELECTION COMMISSION IN OPPOSITION

RECEIVED
HAND DELIVERED
NOV 10 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

LAWRENCE M. NOBLE
General Counsel

RICHARD B. BADER *
Associate General Counsel

VIVIEN CLAIR
Attorney

Attorneys for Respondent
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 219-3690

* Counsel of Record

November 10, 1992

29 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether *certiorari* should be granted to review the level of scrutiny applied by the *en banc* court of appeals in upholding the constitutionality of 2 U.S.C. § 438(a)(4), which protects contributor lists required to be filed with the Federal Election Commission by political committees from being used by competing solicitors, even though there is no challenge to the court's findings that the provision is narrowly tailored to serve purposes that this Court has previously found compelling.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
COUNTERSTATEMENT OF THE CASE	2
A. The Applicable Statute	2
B. Background	4
C. Proceedings in the District Court	5
D. The Decision of the *En Banc* Court of Appeals	6
ARGUMENT	11
I. SECTION 438(a)(4) PRESERVES POLITICAL DISCOURSE BY PROTECTING THE PROPERTY RIGHTS OF POLITICAL COMMITTEES IN THEIR CONTRIBUTOR LISTS, WITHOUT INFRINGING FIRST AMENDMENT RIGHTS	13
II. PETITIONERS HAVE PRESENTED NO OTHER ISSUES WARRANTING REVIEW BY THIS COURT	17
CONCLUSION	23

TABLE OF AUTHORITIES

CASES — Page

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) 19
Buckley v. Valeo, 424 U.S. 1 (1976) 8, 13, 15
Burson v. Freeman, 112 S.Ct. 1846 (1992) 18
Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 12, 21
FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 17
FEC v. National Conservative Political Action Comm., 470 U.S. 480 (1985) 15
FEC v. National Right to Work Comm., Inc., 459 U.S. 197 (1982) 20
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 8
The Florida Star v. B.J.F., 491 U.S. 524 (1989) 18
Lawn v. United States, 355 U.S. 339 (1958) 13
National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990) 7
Neely v. Eby Construction Co., 386 U.S. 317 (1967) 13
Perry v. Sindermann, 408 U.S. 593 (1972) 21
Regan v. Taxation With Representation, 461 U.S. 540 (1983) 21
Regan v. Time, Inc., 468 U.S. 641 (1984) 18
Rust v. Sullivan, 111 S.Ct. 1759 (1991) 21
Ryan v. Kirkpatrick, 669 S.W.2d 215 (Mo. 1984) 22
San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) 8, 16
Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) 18, 19
Speiser v. Randall, 357 U.S. 513 (1958) 21
United States v. Kokinda, 110 S.Ct. 3115 (1990) 18

STATUTES AND REGULATIONS

2 U.S.C. § 431(4) 4
431(13)(A) 3
432(c)(2) 2
433(a) 4

TABLE OF AUTHORITIES—Continued

	Page
2 U.S.C. § 434	11
434(a)	3
434(b)	3
437c(b)(1)	3
437d(a)	3
437d(e)	3
437f	3
437g	3
437g(a)(1)	3
437g(a)(2)	3, 5
437g(a)(6)	6
437h	3, 5, 6
438(a)(4)	*passim*
Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455	*passim*
Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972)	2
Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974)	2
Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976)	2
Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980)	2
Social Security Amendments of 1977, Pub. L. No. 95-216, Title V, Sec. 502, 91 Stat. 1565 (1977)	2
Trademark Clarification Act, Pub. L. No. 98-620, Title IV, Sec. 402, 98 Stat. 3357 (1984)	2
Pub. L. No. 100-352, Sec. 6(a), 102 Stat. 663 (1988)	2
Pub. L. No. 101-194, Title VI, Sec. 601(b)(1), 103 Stat. 1762 (1989)	2
Pub. L. No. 101-280, Sec. 7(b)(1), 104 Stat. 161 (1990)	2
Pub. L. No. 102-90, Title I, Sec. 6(d), 105 Stat. 451 (1991)	2
11 C.F.R. § 104.15(a)	3
104.15(b)	3
104.15(c)	3, 19

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS Page

U.S. Const. amend. I ..... *passim*
U.S. Const. amend. V 10, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-638

INTERNATIONAL FUNDING INSTITUTE, INC., ET AL.,
PETITIONERS,

v.

FEDERAL ELECTION COMMISSION, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT FEDERAL ELECTION COMMISSION IN OPPOSITION

OPINIONS BELOW

The July 10, 1992, opinion, as amended August 5, 1992 (Pet. App. 1a-23a), of the United States Court of Appeals for the District of Columbia Circuit is published at 969 F.2d 1110. The order of the United States District Court for the District of Columbia certifying to the court of appeals the constitutional question and accompanying findings of fact in this case (Pet. App. 26a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1992. Petitioners filed their petition for a writ of *certiorari* on October 8, 1992. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case concerns the constitutionality of a provision of the Federal Election Campaign Act of 1971, as amended ("the Act"), 2 U.S.C. §§ 431-455,[1] specifically 2 U.S.C. § 438(a)(4). Section 438(a)(4) is reprinted at Pet. App. 40a.

COUNTERSTATEMENT OF THE CASE

A. The Applicable Statute

The Act requires all political committees to keep a record of the name and address of each person who contributes more than $50, 2 U.S.C. § 432(c)(2), and to disclose in reports filed with the Federal Election Commission ("the Commission" or "FEC") the iden-

---

[1] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475; by the Social Security Amendments of 1977, Pub. L. No. 95-216, Title V, Sec. 502, 91 Stat. 1565; by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980); by the Trademark Clarification Act of 1984, Pub. L. No. 98-620, Title IV, Sec. 402, 98 Stat. 3357; by Pub. L. No. 100-352, Sec. 6(a), 102 Stat. 663 (1988); by Pub. L. No. 101-194, Title VI, Sec. 601(b)(1), 103 Stat. 1762 (1989); by Pub. L. No. 101-280, Sec. 7(b)(1), 104 Stat. 161 (1990); and by Pub. L. No. 102-90, Title I, Sec. 6(d), 105 Stat. 451 (1991).

tification of each person whose total contributions to the committee within the calendar year exceed $200. 2 U.S.C. § 434(a), (b).[2] For individual contributors, the Act defines "identification" to mean the individual's name, mailing address, occupation, and the name of the individual's employer. *See* 2 U.S.C. § 431(13)(A).

The provision at issue here, 2 U.S.C. § 438(a)(4), requires the Commission to make all these disclosure reports available for public inspection and copying. Section 438(a)(4) also provides that information copied from these reports "may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using the name and address of any political committee to solicit contributions from such committee." *See also* 11 C.F.R. § 104.15(a), (b). The Commission has promulgated an implementing regulation, 11 C.F.R. § 104.15(c), that permits the publication of individual contributor information obtained from the Commission's files in "newspapers, magazines, books or other similar communications" as long as the "prin-

---

[2] The Commission is the independent agency of the United States government with exclusive primary jurisdiction over the administration, interpretation, and civil enforcement of the Act. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a) and (e), 437f, and 437g. Congress has explicitly authorized the Commission to "formulate policy" under the Act, 2 U.S.C. § 437c(b)(1); to institute investigations of possible violations of the Act, 2 U.S.C. §§ 437g(a)(1) and (a)(2); to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act, 2 U.S.C. §§ 437c(b)(1) and 437d(e); and to initiate actions in the federal courts to construe the constitutionality of any provision of the Act, 2 U.S.C. § 437h.

cipal purpose" of the communications is not to communicate the information "for the purpose of soliciting contributions or for other commercial purposes."

B. Background

Petitioner International Funding Institute, Inc. ("IFI"), is a for-profit political and managerial consulting firm that engages in fundraising, advertising, public relations, marketing, and other commercial activities. (Pet. App. 27a-28a.) Petitioner American Citizens for Political Action ("ACPA") is a registered political committee. (Pet. App. 28a.) *See* 2 U.S.C. §§ 431(4), 433(a). Petitioner Robert E. Dolan ("Dolan") is IFI's sole director, officer, and stockholder, and ACPA's chairman and treasurer. (Pet. App. 28.)

Shortly after creating IFI, Dolan bought IFI a subscription to an on-line computer data base containing individual contributor information compiled from the disclosure reports made available to the public by the Commission pursuant to 2 U.S.C. § 438 (a)(4). (Pet. App. 30a.) The subscription agreement stated that the information had been copied from these reports and that "[i]t is a violation of federal law to sell or use information copied from such reports for the purpose of soliciting contributions from other than political committees." (Pet. App. 30a.)

IFI nevertheless compiled this information into mailing lists, one of which it labeled "Active Republican Donors." (Pet. App. 30a.) Dolan then hired a list brokerage company to market the "Active Republican Donors" list for profit on behalf of IFI. The brokerage company rented the list for a fee to

approximately five different organizations, at least four of which used the list for solicitation purposes. The brokerage company retained a commission and forwarded the remainder of the rental fee to IFI as earned income. (Pet. App. 31a.) ACPA was one of the organizations that rented the "Active Republican Donors" list from IFI's brokerage agent. Dolan had five test mailings made from the list on behalf of ACPA, each of which solicited contributions from 5,000 individual contributors. (Pet. App. 31a.)

The Commission instituted an administrative investigation, pursuant to 2 U.S.C. § 437g(a)(2), after receiving two complaints alleging that ACPA had sent solicitation letters, signed by Dolan, to addresses of pseudonyms authorized by the Act to be included in political committee reports filed with the Commission. (Pet. App. 31a-32a.)[3] After the investigation, the Commission found "probable cause to believe" that IFI, ACPA, and Dolan had knowingly and willfully violated 2 U.S.C. § 438(a)(4). The Commission's attempt to conciliate was unsuccessful. (Pet. App. 32a-33a.)

C. Proceedings in the District Court

On March 9, 1990, Dolan filed a suit against the Commission under 2 U.S.C. § 437h[4] in which he chal-

---

[3] "A political committee may submit 10 pseudonyms on each report filed in order to protect against the illegal use of names and addresses of contributors." 2 U.S.C. § 438(a)(4).

[4] Section 437h provides:

> The Commission . . . or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the

lenged the constitutionality of section 438(a)(4). On July 13, 1990, pursuant to 2 U.S.C. § 437g(a)(6), the Commission filed suit to enforce the Act against IFI, ACPA, and Dolan. They moved to dismiss the enforcement suit on the ground that section 438 (a)(4) is unconstitutional. Dolan voluntarily dismissed his section 437h action, but the parties agreed that the Commission would amend its complaint to include a request for certification under 2 U.S.C. § 437h. (Pet. App. 33a.)

In an order filed January 25, 1991 (Pet. App. 26a-33a), the district court granted the Commission's motion to amend its complaint and certified the constitutional question to the court of appeals. The court also adopted findings of fact, proposed by the Commission and supported by evidence, which the court noted were "substantively unopposed by defendants." (Pet. App. 27a.) On October 23, 1991, the district court denied the defendants' motion to strike the court's findings of fact and to certify the case without factual findings. (Pet. App. 34a-39a.)

D. The Decision of the *En Banc* Court of Appeals

On July 10, 1992, the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, unanimously held that 2 U.S.C. § 438(a)(4)'s proviso is constitutional on its face and as applied to the petitioners under the First Amendment. The

---

United States . . . as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

court concluded that the proviso's use restriction "advances an important governmental interest, *viz.* in reserving the value of a contributor list to the political committee that creates it, and is no broader than is necessary to that task" (Pet. App. 13a). The court found that, "far from discouraging political discourse," section 438(a)(4) "promotes political discourse" and " 'helps to preserve the viability of the system of private financing of elections' " (Pet. App. 11a, 12a).

The court pointed out that contributor lists are a political committee's " 'most valuable assets,' the product of 'time-consuming, labor-intensive activities that can cost a political committee thousands, even millions, of dollars.' " Political committees therefore " 'safeguard the confidentiality of their contributor lists' and disclose them to the public only under the compulsion of the Act" (Pet. App. 10a) (quoting the district court's findings of fact). " '[B]usiness people will not overlook an opportunity to get cheaply from the Government what otherwise comes dearly, a list of qualified prospects' " (Pet. App. 10a) (quoting *National Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 878 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990)). Thus, without section 438(a)(4)'s sale-or-use proviso, "innumerable entrepreneurs would, like the [petitioners] here, be able freely to appropriate to themselves part of the value of the contributor lists compiled by reporting political committees" (Pet. App. 11a). As a result, political committees "would raise less money, spend less money, and correspondingly underwrite less political discourse" (Pet. App. 11a).

The court found that section 438(a)(4) serves important governmental interests by minimizing these adverse effects of the Act's disclosure requirements. First, it "protects the value of a political committee's intellectual property for its own sake," a governmental interest that "alone might qualify as 'substantial'" (Pet. App. 10a). A party has "no '"First Amendment right to appropriat[e] to itself the harvest of those who have sown"'" (Pet. App. 10a) (quoting *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522, 537-39 (1987)). Second, by protecting the economic value of contributor lists, the proviso "preserves political discourse at its pre-Act level" (Pet. App. 11a). Petitioners "do not take issue," the court of appeals observed, "with the FEC's assertion that the use restriction of § 438(a)(4) promotes political discourse; nor are they so fond as to argue that preserving political discourse is not an important governmental interest" (Pet. App. 12a).[5]

---

[5] Because it found the government's interest in protecting the value of a contributor list to the political committee that created it was sufficient to uphold the statute, the court of appeals did not address the additional ground, "bolstered by legislative history" (Pet. App. 13a), advanced by the Commission: Section 438(a)(4) protects the effectiveness of the private election campaign financing system by reducing the discouraging effects of compelled disclosure on the willingness of individuals to help finance political speech. *Cf. Buckley v. Valeo*, 424 U.S. 1, 83 (1976) ("[S]trict [disclosure] requirements may well discourage participation by some citizens in the political process, a result Congress hardly could have intended."); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788 (1978) ("'[S]ustaining the active, alert responsibility of the individual citizens in a democracy for the wise conduct of government'" is an "interest[] of the highest importance.").

The court noted that section 438(a)(4) serves these important interests in a manner that is viewpoint neutral (Pet. App. 6a) and does not condition the receipt of a government benefit upon the recipient's altering any of its independent activities (Pet. App. 8a). The statute only "restricts . . . the use to which one may put the compulsorily disclosed list of a political committee" (Pet. App. 8a) and does not even "prevent one from soliciting a person who is on a committee's contributor list, so long as one does not obtain that person's name (directly or indirectly) from a list filed with the FEC" (Pet. App. 13a). Because petitioners had no right, prior to the enactment of the federal campaign disclosure laws, to inspect or use a political committee's list of contributors without that committee's consent (Pet. App. 4a, 6a), "the statute simply leaves undisturbed a pre-existing barrier to the [petitioners'] use of another committee's list to solicit contributions" (Pet. App. 5a). Thus, the proviso "cannot be said in any sensible way to infringe upon the [petitioners'] first amendment right to solicit contributions for a political cause" (Pet. App. 5a). Because section 438(a)(4) serves important governmental interests and is no broader than necessary, the court concluded that the provision does not violate the First Amendment. (Pet. App. 9a, 13a.)

Four judges of the *en banc* court of appeals concurred separately. All agreed, however, that section 438(a)(4) is constitutional because it serves the government's interest in preserving valuable property rights of reporting political committees while having negligible, if any, impact on petitioners' freedom of speech. Judge R.B. Ginsburg, joined by Judge Ed-

wards, emphasized that section 438(a)(4) is viewpoint neutral and that it does not provide access to government benefits "contingent on an individual's relinquishing a civil right" (Pet. App. 14a). Judge Buckley pointed out that what petitioners are actually seeking here is "the uncompensated use of lists of names and addresses compiled at considerable cost by private parties." He concluded that it would "extend the reach of the First Amendment beyond reason" to "sanction what would otherwise be an act of piracy."

Although Judge Randolph disagreed with the majority's discussion of the appropriate level of scrutiny, he not only agreed with the result but found the case to be "rather easy" (Pet. App. 20a).

> [T]he proviso neither directly limits the ability of citizens to speak nor conditions the receipt of a government benefit on the waiver of the right to speak. Nor does it place restrictions on the use of information the government itself has generated and released to the public. The proviso simply restricts a citizen's right to use another's property (here, the contributor lists), property to which no one other than the owner has any separate, independent claim.

(Pet. App. 20a.) Indeed, "[i]f the government forced political committees to disclose their lists to the public without imposing any restrictions on how the lists might be used, this might constitute a taking under the Fifth Amendment" (Pet. App. 20a). Thus, section 438(a)(4) "preserves the property, avoids a taking, encourages compliance with the disclosure laws by removing an incentive to disobey them, and arguably enhances speech by allowing political com-

mittees to reap the full benefit of their labors" (Pet. App. 20a-21a). Judge Randolph therefore concluded (Pet. App. 21a) (citation omitted):

> The proviso draws a line "to assure the due protection" of the rights of private property owners and the interests of citizens in learning the identity of contributors. . . . The accommodation thus made, while perhaps not constitutionally compelled, is constitutionally permissible.

ARGUMENT

The Federal Election Campaign Act requires federal candidates and political committees to file financial reports with the Commission that, *inter alia*, list the names and addresses of all their contributors of $200 or more. 2 U.S.C. § 434. The provision at issue in this case, 2 U.S.C. § 438(a)(4), requires that these reports be made available for public inspection and copying by the Commission, but prohibits the sale or use of the information about contributors contained in these reports "for the purpose of soliciting contributions or for commercial purposes . . . ." The impact of this provision is extremely narrow, for it has no application beyond the use of "information copied from such reports." *Id.* Thus, it does not infringe at all on petitioners' freedom to solicit contributions from anybody, for any purpose, at any time or place and in any manner they choose; it does not even "prevent [them] from soliciting a person who is on a committee's contributor list, so long as [they do] not obtain that person's name (directly or indirectly) from a list filed with the FEC" (Pet. App. 13a).

As we discuss in Part I below, the *en banc* court of appeals concluded unanimously that section

438(a)(4) does not violate petitioners' rights under the First Amendment because this narrow provision has only negligible, if any, effect on petitioners' freedom of expression and because it is narrowly tailored to serve important governmental interests. Specifically, the court concluded that the provision ensures that compulsory disclosure of contributors pursuant to the Act does not rob political committees of the value of their property interest in the contributor lists they create at great effort and expense, by enabling competitors to exploit the lists for their own financial gain. The court also concluded that the factual record compiled in the district court established that this protection serves to preserve vigorous political discourse by encouraging political committees to expend the effort necessary to develop a base of supporters willing to finance their political speech.[6]

Surprisingly, the petition for a writ of *certiorari* does not dispute, or even address, any of these findings by the court of appeals, which were the basis for its decision to declare section 438(a)(4) constitutional. In the court of appeals as well, petitioners did "not take issue with the FEC's assertion that the use restriction of § 438(a)(4) promotes political discourse" and did not "argue that preserving political discourse is not an important governmental interest" (Pet. App. 12a). Petitioners' failure to contest these dispositive issues either in the court of appeals or in the petition for writ of *certiorari* precludes them from contesting them before this Court. *See, e.g., Delta Air Lines v. August*, 450 U.S. 346, 362 (1981);

---

[6] Although four judges filed concurring opinions, they all agreed that the provision is constitutional essentially for these same reasons.

Neely v. Eby Construction Co., 386 U.S. 317, 330 (1967); *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958).

Rather than even attempting to argue that the court's analysis of the effect of this provision was flawed in any way, the petition only asks that *certiorari* be granted to consider abstract doctrinal questions about the scope of some of this Court's prior decisions, most of which are not even applicable in this case, and none of which conflicts with the result agreed upon here by all eleven judges of the court of appeals. The petition therefore fails to identify any issue properly presented by the decision of the *en banc* court of appeals that warrants plenary review by this Court.

I. SECTION 438(a)(4) PRESERVES POLITICAL DISCOURSE BY PROTECTING THE PROPERTY RIGHTS OF POLITICAL COMMITTEES IN THEIR CONTRIBUTOR LISTS, WITHOUT INFRINGING FIRST AMENDMENT RIGHTS.

In *Buckley v. Valeo*, 424 U.S. 1, 66 (1976), this Court acknowledged that requiring the public disclosure of lists of contributors to political committees affects sensitive First Amendment activities, but found the Act's disclosure requirements constitutional nonetheless because they serve three compelling governmental interests: (1) providing the electorate with information to evaluate candidates; (2) avoiding corruption and the appearance of corruption; and (3) collecting information to detect violations of the Act's contribution limits. Although Congress found it necessary to require political committees to deposit lists of their contributors with the Commission for public inspection in order to serve these important interests,

Congress at the same time prohibited the "sale or use" of "information copied from such reports" for "the purpose of soliciting contributions or for commercial purposes." 2 U.S.C. § 438(a)(4).

"[A]s can be seen from the face of the statute," this provision "protects a political committee against losing the economic value of its contributor list merely because it must publicly disclose the list" (Pet. App. 9a). As the court of appeals noted (Pet. App. 10a), the district court's factual findings, which petitioners did not dispute, establish that "a 'political committee's contributor lists are its most valuable assets,' the product of 'time-consuming, labor-intensive activities that can cost a political committee thousands, even millions, of dollars' "; that political committees therefore " 'safeguard the confidentiality of their contributor lists' and disclose them to the public only under the compulsion of the Act"; and that "the economic value of a contributor list would be reduced if a competing fundraiser were able to obtain the list and use it to solicit contributions." The court of appeals concluded that "[section] 438(a)(4) protects against that diminution of value by preserving for the compiling committee the exclusive right to use its contributor list to solicit contributions, a right that the compiling committee would but for the Act have protected simply by keeping the list secret" (Pet. App. 10a).

As the court of appeals suggested (Pet. App. 10a), this Court's precedents indicate that the governmental interest in thus "protect[ing] the value of a political committee's intellectual property" from being unnecessarily undermined by the Act is important in itself. *See also* Pet. App. 17a (Buckley, J., concur-

ring) (Section 438(a)(4) "protects the reporting committees' proprietary interests against unwarranted infringement"). Indeed, Judge Randolph pointed out that this provision serves to ensure that the Act's disclosure provisions do not result in a taking in violation of the Fifth Amendment. (Pet. App. 20a.) It can hardly be disputed that Congress has a compelling interest in ensuring the constitutional validity of the disclosure requirement itself, which this Court has already found to serve compelling governmental interests. *See* p. 13, *supra*.

Even more importantly, however, section 438(a)(4) "protects political discourse from the adverse effect that the disclosure requirement of the Act would otherwise have," because "if the return on their investment in solicitation would be reduced by others using the resulting lists, political committees would not find it worthwhile to solicit as much as they now do; they would raise less money, spend less money, and correspondingly underwrite less political discourse" (Pet. App. 11a). This Court has recognized that "facilitat[ing] and enlarg[ing] public discussion and participation in the electoral process" are "goals vital to a self-governing people," and a statute serving such interests "furthers, not abridges, pertinent First Amendment values." *Buckley v. Valeo*, 424 U.S. at 92-93. *See also FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 494 (1985) (preservation of the ability of political committees to "amplify the voices of their adherents" in political debate is an interest of constitutional stature).[7]

---

[7] As discussed *supra* n.5, section 438(a)(4) serves additional compelling interests that the court of appeals did not address.

Section 438(a)(4) serves these compelling interests without imposing any new burden on the right to solicit political contributions. Petitioners are free to solicit contributions from anyone they want, at any time or place and in any maner they choose. The provision does not even "inhibit them from contacting the very individuals whose names appear on the FEC lists they inspect (so long as solicitees' names are obtained from an independent source)" (Pet. App. 15a) (R. B. Ginsburg, J., concurring). "[T]he statute simply leaves undisturbed a preexisting barrier to [petitioners'] use of another committee's list to solicit contributions: In order for the defendants to use the list to solicit, they must, as before the passage of FECA, obtain the other committee's permission, perhaps at a price" (Pet. App. 5a).

In sum, this narrow proscription on "the uncompensated use of lists of names and addresses compiled at considerable cost by private parties" goes no further than to prohibit "what would otherwise be an act of piracy" (Pet. App. 17a) (Buckley, J., concurring). "[Petitioners] may still obtain names of potential contributors in each of two familiar ways: by [themselves] undertaking the effort or by purchasing a list from a seller who has done the sweat work" (Pet. App. 15a) (R.B. Ginsburg, J., concurring). Such a restriction does not infringe petitioners' First Amendment rights, for they have no "First Amendment right to 'appropriat[e] to [themselves] the harvest of those who have sown.'" *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 541 (1987).

II. PETITIONERS HAVE PRESENTED NO OTHER ISSUES WARRANTING REVIEW BY THIS COURT.

Petitioners' failure in their petition even to question any of the conclusions of the court of appeals, discussed in Part I, regarding the importance of the interests served by section 438(a)(4) and the minimal impact the provision has on petitioners' ability to solicit contributions eliminates any serious question about the provision's constitutionality before this Court. Indeed, petitioners themselves ask this Court to review this case only to consider whether the court of appeals identified the proper standard of review and to clarify the scope of some of this Court's recent precedents.

The court of appeals properly explained that a lower level of scrutiny was appropriate in this case because of the negligible effect section 438(a)(4) has on petitioners' expressive activities. (Pet. App. 6a-8a.) However, we have shown above that this Court has already recognized that the viability of private financing of political speech, and thereby the vitality of political debate in our country's election campaigns, is an interest of the highest national importance. Since petitioners have failed in their petition to dispute the conclusion of the court of appeals that section 438(a)(4) serves that important interest, there would be no basis for invalidating section 438(a)(4) under the First Amendment even under a higher standard of review. Petitioners' mere disagreement with one aspect of the reasoning of the court of appeals, which would not alter the outcome of the case, does not merit review by this Court. *Cf. FCC v. Pacifica Foundation*, 438 U.S. 726, 734 (1978) (Supreme Court "'reviews judgments, not

statements in opinions,' " especially "when the statements raise constitutional questions").

Petitioners' search through several lines of cases for a conflict with the level of scrutiny applied by the court of appeals here is, in any event, futile. Initially, the cases petitioners cite in which this Court has applied strict scrutiny involved statutes that directly impeded a party's ability to speak publicly on certain subjects at all [8] or completely prohibited a specific type of speech at a particular time or place or in a particular manner.[9] Section 438(a)(4), on the other hand, does not restrict petitioners' freedom to solicit contributions from anyone, at any time or place of their choosing and in any manner they like. Section 438(a)(4) only denies petitioners the right to use a competitor's list of contributors as a source of names and addresses for their solicitations. *See* p. 16, *supra*. Thus, as the court of appeals concluded, "[t]he implicit premise of" petitioners' argument for applying strict scrutiny "is that [section 438(a)(4)] in some way infringes upon defendants' right to solicit contributions for a political cause. But that is not at all the case" (Pet. App. 4a). Petitioners have

---

[8] *See, e.g., Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (statute prohibited newspapers from publishing the names of juvenile offenders); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (statute prohibited newspapers from publishing the names of rape victims).

[9] *See, e.g., Burson v. Freeman*, 112 S.Ct. 1846 (1992) (statute prohibiting political solicitations within 100 feet of polling place); *Regan v. Time, Inc.*, 468 U.S. 641 (1984) (statute prohibiting publication of picture of currency without specified alterations); *United States v. Kokinda*, 110 S.Ct. 3115 (1990) (regulation prohibiting solicitation of contributions in specific area in front of Post Office).

offered this Court no reason to disturb this conclusion.

Petitioners' heavy reliance (Pet. 7-8, 9-11) upon *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), and its progeny is misplaced here for another reason. Even petitioners acknowledge that those cases only applied strict scrutiny to "restrictions on the publication of public information" (Pet. 10), and the instant case does not involve an attempt to publish any information contained in Commission records. ACPA violated section 438(a)(4) by using names and addresses obtained from Commission records to solicit contributions, and IFI violated the statute by using names and addresses obtained from the Commission's records to create and market a solicitation list through a list broker. (Pet. App. 3a, 31a.) Since none of the petitioners sought to publish information from government records, and the violations they have been charged with do not involve publication of such information, these cases are simply inapplicable here.[10]

---

[10] Although this case does not involve the sort of restriction on the right of the news media to publish government information that was at issue in the *Smith* line of cases, it should be noted that the Commission has promulgated a regulation that explicitly permits the news media to use information from political committees' contributor reports in "newspapers, magazines, books or other similar communications" that have a "principal purpose" other than the mere commercial sale of the copied contributor lists themselves. 11 C.F.R. § 104.15(c). This regulation "ensures that the Act does not hinder or prevent the institutional press from reporting on and publishing editorials about newsworthy events." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668 (1990).

Petitioners argue (Pet. 11-13) that because section 438(a)(4) is narrowly tailored to protect contributor lists from being appropriated by others for solicitation and commercial uses, it "is a content-based restriction on protected speech" (Pet. 12). In the context of campaign finance regulation, however, this Court has found statutory limitations on the solicitation of contributions to be constitutional. *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982). Moreover, this argument once again ignores the finding of the court of appeals that section 438(a)(4) does not actually restrict petitioners' speech at all. Thus, petitioners are wrong in asserting (Pet. 13) that the court of appeals concluded that section 438(a)(4) "is not a content-based prohibition because it applies without regard to viewpoint." The court did point out that the admitted viewpoint-neutrality of section 438(a)(4) reduces First Amendment concerns (Pet. App. 6a, 14a-15a) (R.B. Ginsburg, J., concurring). However, the court's rejection of petitioners' argument was not based upon a finding that section 438(a)(4) is entirely content-neutral, but on the fact that section 438(a)(4) operates to facilitate some other forms of speech rather than to restrict petitioners' own ability to engage in solicitation. In contrast, the cases petitioners rely upon for this argument all involved actual restrictions on speech that are in no way comparable to the benign effect of section 438(a)(4) on petitioners' activities.

As the court of appeals pointed out (Pet. App. 7a, 14a-15a) (R.B. Ginsburg, J., concurring), this Court has not applied strict scrutiny to statutes, like section 438(a)(4), that provide government support to some forms of speech and not to others but do not restrict

the ability to speak on any subject without using the government support. *Regan v. Taxation With Representation*, 461 U.S. 540 (1983); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). Petitioners do not suggest that these decisions conflict in any way with the decision of the court of appeals. Instead, they ask the Court to use this case to limit "the scope" of these decisions (Pet. 6), which, they argue (Pet. 8-9), are in tension with the so-called "unconstitutional conditions" cases, *Perry v. Sindermann*, 408 U.S. 593 (1972), and *Speiser v. Randall*, 357 U.S. 513 (1958).

We note initially that petitioners did not make this argument to the court of appeals; indeed, none of these four cases was even cited in petitioners' appellate brief. Accordingly, this issue cannot properly be raised here. *Delta Air Lines v. August*, 450 U.S. at 362. In any event, this Court explained only last year that the "unconstitutional conditions" cases cited by petitioners "involve situations in which the government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 111 S. Ct. at 1774. The court of appeals applied this very distinction when it reviewed these cases and concluded that stricter scrutiny has been applied to "statutes that condition the receipt of a government benefit upon the recipient's altering its independently funded activities" than to "statutes that restrict only the use to which the recipient may put the government benefit" (Pet. App. 7a-8a; 14a-15a) (R.B. Ginsburg, J., concurring). Section 438(a)(4) "fits neatly within the latter category; it in no way restricts anything but the use to which one may put

the compulsorily disclosed list of a political committee" (Pet. App. 8a). Petitioners have presented no basis for questioning this conclusion, and there is obviously no "urgent need" (Pet. 8) for this Court to grant *certiorari* in this case merely to consider once again a principle that it reaffirmed just last year.

Petitioners have found only one case that conflicts with the result reached by the court of appeals, but even that decision does not present a genuine conflict with the rationale of this case. In *Ryan v. Kirkpatrick*, 669 S.W.2d 215 (Mo. 1984) (*en banc*), the Supreme Court of Missouri found that a state statute modeled on 2 U.S.C. § 438(a)(4) violated the First Amendment. However, the *Ryan* decision predated this Court's decision in *Rust*, and the governmental interests the *en banc* court of appeals found sufficient to justify section 438(a)(4) in this case were not even presented to the *Ryan* court by the State of Missouri.[11] Since the Missouri court has never had an opportunity to consider the analysis that led all eleven judges of the District of Columbia Circuit to agree that section 438(a)(4) is constitutional, it is reasonable to anticipate that if the issue came before it today, the Missouri court would be persuaded by this reasoning, which would make review by this Court entirely unnecessary. Accordingly, until the Missouri court has an opportunity at least to consider the legal basis on which the court of appeals upheld the constitutionality of section 438(a)(4) in this case, there is no need for this Court to rush to resolve what is likely to be a fleeting conflict.

---

[11] Perhaps this is why the court of appeals found it unnecessary even to mention the *Ryan* decision, even though petitioners relied upon it in their appellate brief.

CONCLUSION

For the foregoing reasons, the Federal Election Commission respectfully requests the Court to deny the petition for a writ of *certiorari* to review the unanimous decision of the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, holding 2 U.S.C. § 438(a)(4) constitutional under the First Amendment.

Respectfully submitted,

LAWRENCE M. NOBLE
General Counsel

RICHARD B. BADER *
Associate General Counsel

VIVIEN CLAIR
Attorney

Attorneys for Respondent
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 219-3690

* Counsel of Record

November 10, 1992

☆ U. S. GOVERNMENT PRINTING OFFICE, 1992 334379 70005